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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

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UNITED STATES OF AMERICA	*
	*
v.	* 08-cr-128-01-PB
	* December 16, 2009
	* 11:35 a.m.
KURT SANBORN	*
	*
* * * * *	

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE PAUL J. BARBADORO

Appearances:

For the Government:	Robert Kinsella, AUSA U.S. Attorney's Office 53 Pleasant Street Concord, NH 03301
For the Defendant via video:	Alan Baum, Esq. Law Offices of United Defense Group 4181 Sunswept Drive, Suite 100 Studio City, CA 91604
Court Reporter:	Sandra L. Bailey, LCR, CM, CRR Official Court Reporter United States District Court 55 Pleasant Street Concord, NH 03301 (603)225-1454

1 BEFORE THE COURT

2 THE CLERK: Court's in session and has for
3 consideration a motion hearing in United States of
4 America versus Kurt Sanborn, Criminal Case Number
5 08-cr-128-01-PB.

6 THE COURT: All right, we have a video
7 conference. I want to be sure that counsel can hear
8 what's being said. Can you hear me, counsel?

9 MR. BAUM: Yes, your Honor, I can indeed.

10 THE COURT: Okay, good. All right, Mr.
11 Sanborn filed a letter with me in which he made certain
12 allegations concerning his desire to take money that he
13 had accumulated through extra work for purposes of
14 applying it to restitution but instead his lawyer had
15 him apply it, as I understood it, to pay his outstanding
16 legal fees. Mr. Sanborn then filed some kind of motion
17 to withdraw without prejudice. And I think these are
18 serious allegations and if he wants to pursue them, we
19 ought to find out what's really going on here, because
20 if we don't deal with it now, chances are good I'll have
21 to deal with it later on.

22 So what I propose to do is, unless someone can
23 persuade me otherwise, is take up the allegations, find
24 out what happened, determine whether it could have any
25 affect on my sentencing judgment, and resolve the matter

1 today.

2 Does someone want to try to persuade me that I
3 shouldn't do that?

4 MR. KINSELLA: No, judge. I think that you
5 have at least touched upon the fact that I was at least
6 a little bit concerned, but I do not object to the
7 proceeding going forward, that this is probably a matter
8 that is handled technically under 2255. Judgment has
9 been entered. It's been more than seven days past, but
10 I don't object to --

11 THE COURT: Yeah, my view is it hinges on
12 certain facts, factual allegations, and the best time to
13 find facts is as close as possible to the time when the
14 issue arises. I'm not saying that it would have any
15 effect on my sentencing judgment. I need to know all of
16 the details. But if counsel has behaved improperly and
17 in a way that prejudiced his client and it would affect
18 potentially the client's sentencing, and the client's
19 likely to raise the issue in a 2255 later on anyways,
20 let's get it out on the table and get it resolved.
21 That's my thought.

22 MR. KINSELLA: I agree with that procedure.

23 THE COURT: All right. Now, Mr. Sanborn,
24 nobody else is objecting, saying we shouldn't proceed
25 now. Mr. Sanborn, what I interpreted your letter to me

1 to say is, judge, at the sentencing you said that at
2 least in one other case you took into account someone's
3 willingness to work extra jobs to generate money that
4 the court couldn't force them to earn to make
5 restitution prior to sentencing and that you considered
6 that defendant's actions favorably when you sentenced
7 him. And then you in your letter, as I'm understanding
8 it, went on to tell me, judge, I did just that. I took
9 extra jobs and tried to earn money to accumulate money
10 to make -- towards making restitution payments, and
11 that's what I wanted to do, but my lawyer told me it
12 wouldn't do me any good and I owed the money in legal
13 fees anyways, so he just took the money that I was going
14 to make for restitution to pay the outstanding legal
15 fees. And that's what I interpret your letter to me to
16 say.

17 Am I correctly interpreting your letter, Mr.
18 Sanborn? I'm asking you. You can stand right there or
19 sit, however you want. It doesn't matter.

20 MR. SANBORN: Your Honor, all of everything
21 that's in my letter I found out after I left the court.
22 It actually occurred through my mother and family, all
23 or most communication was through Mr. Baum and my
24 mother, so she's here to give you the entire story.

25 THE COURT: Well, no, I guess what I'm saying,

1 did I correctly interpret your letter to me. That you
2 said, judge, I took extra jobs and worked extra jobs to
3 accumulate money for the purpose of making restitution
4 payments, and I wanted to make restitution payments with
5 that money, but my lawyer convinced me to pay it to him
6 instead of to making restitution.

7 Is that -- are you alleging that?

8 MR. SANBORN: Everything is accurate in what
9 you say, your Honor, except he didn't ask me to have
10 them transfer the money, it was sent on to him
11 specifically for restitution.

12 THE COURT: Well, let me try to give you more
13 specifics. Did you take extra jobs to earn money to
14 apply towards your restitution, anticipated restitution
15 obligation?

16 MR. SANBORN: Yes, sir.

17 THE COURT: What jobs did you take?

18 MR. SANBORN: I worked -- I have a full-time
19 job in sales, so I travel a lot, so I was very kind of
20 makeshift, but I was able to work on weekends and on
21 Sundays to help put in irrigation systems and things
22 like that for my brother's landscaping company which he
23 then gave the money to my mother to save for me in
24 anticipation of trying to do whatever I could
25 financially to help pay restitution.

1 THE COURT: All right, so in addition to your
2 sales job you worked for your brother installing --

3 MR. SANBORN: Irrigation systems.

4 THE COURT: Irrigation systems. And your
5 brother paid the money that he owed to you to your
6 mother rather than to you.

7 MR. SANBORN: I don't have a great track
8 record of saving money, so it was going right to my
9 mother so that I would have some form of restitution
10 based upon Mr. Baum encouraging me to do so.

11 THE COURT: All right, so Mr. Baum had in fact
12 told you it would be a good thing if you could
13 accumulate some money to apply to restitution.

14 MR. SANBORN: And I tried not only by working,
15 but family and friends also helped participate because
16 he said the bigger number I could give, the more impact
17 it would have on this court. And we even got to the
18 point where we considered selling my mother's house and
19 things like that to try to do as much as we could to pay
20 that number down.

21 THE COURT: All right. How much money did you
22 accumulate in your mother's possession through your own
23 labor, working doing installing irrigation systems?

24 MR. SANBORN: Only about \$5,000.

25 THE COURT: So about \$5,000 was accumulated

1 through your labor?

2 MR. SANBORN: Correct.

3 THE COURT: Did you get any additional money
4 from third parties that was in this pool of money?

5 MR. SANBORN: Yes, sir.

6 THE COURT: And how much was that?

7 MR. SANBORN: About \$15,000.

8 THE COURT: All right. So, you earned 5,000
9 and your family and friends contributed an extra 15,000,
10 and all of this was being maintained by your mother, a
11 total of about \$20,000?

12 MR. SANBORN: Yes, sir.

13 THE COURT: And this was separate and apart
14 from any fee arrangement you had with your counsel?

15 MR. SANBORN: We were specifically saving it
16 and acquiring it to get it to him prior to trial so that
17 he would be able to present it to you here in this court
18 that day.

19 THE COURT: All right. And you say in fact
20 something else happened to the money?

21 MR. SANBORN: I would be telling you from what
22 I'm being told by my mother and family what happened.
23 If the court allows, she would be happy to come up and
24 tell you exactly what occurred.

25 THE COURT: Well, I'm trying to -- I'm trying

1 to understand what you know. So did you know prior to
2 sentencing that you had accumulated through your labor
3 and contributions from family approximately \$20,000?

4 MR. SANBORN: I knew that my mother had
5 forwarded at Mr. Baum's request to Kathleen in the
6 office \$20,000 of payments that were designated for
7 restitution.

8 THE COURT: All right. And did you have any
9 discussions with Mr. Baum prior to sentencing about the
10 plan to offer that as restitution?

11 MR. SANBORN: He said to me that the figure,
12 he said to all of us, my entire family, that the amount
13 of money that we had acquired would be an insult to
14 present to the court.

15 THE COURT: So you did have the discussion
16 with him in the presence of other people?

17 MR. SANBORN: Yes. He told us that it would
18 be detrimental to me for you to be presented 20,000
19 because based on the time it took to finally get to
20 sentencing, I should have acquired a lot more money than
21 that.

22 THE COURT: All right. And so what did -- did
23 he then say what should happen to the money?

24 MR. SANBORN: At that point he went over and
25 started discussing things with my mother.

1 THE COURT: And when did this conversation
2 take place?

3 MR. SANBORN: About two minutes before we came
4 into the court.

5 THE COURT: So the first you had heard about
6 the 20,000 not being offered as restitution was the day
7 of the sentencing?

8 MR. SANBORN: When we left chambers here, Mr.
9 Baum left, and my family said that they were prepared to
10 jump out of their seat to say why don't you tell the
11 judge that you did work, we did raise money and, you
12 know, maybe \$20,000 isn't a lot to, you know, people,
13 but it is to us. And they said that -- my mother at
14 that point told me that he had her write a handwritten
15 note to transfer the money from the trust account at his
16 law firm to their business account for payment.

17 THE COURT: What was your fee arrangement with
18 Attorney Baum?

19 MR. SANBORN: When I first hired him, he told
20 me it would be 150,000 to go to trial and 50,000 to
21 plea, and my family can't afford 150,000, so.

22 THE COURT: And did you give him the \$50,000?

23 MR. SANBORN: We gave him 30.

24 THE COURT: You gave him 30.

25 MR. SANBORN: We still owed him 20.

1 THE COURT: And you owed him 20. And what
2 arrangements, if any, did you make with him concerning
3 the \$20,000?

4 MR. SANBORN: There was never -- I mean, we
5 would just pay him, but there was never any arrangement,
6 just there was a signed agreement at the outset over a
7 year ago that had a \$50,000 fee in it, so we still owed
8 \$20,000.

9 THE COURT: And is it just a coincidence that
10 the amount you owed him was the same amount that you and
11 your family had accumulated for restitution?

12 MR. SANBORN: I should say I don't really know
13 how much we owe him because we paid sporadically when we
14 had money to his bill. He took the 20, so I'm assuming
15 it was 20. I don't really know, your Honor, how much is
16 really owed.

17 THE COURT: All right.

18 MR. SANBORN: I know that we had paid --
19 through the course of the last year the communication
20 with Mr. Baum's firm was not truly with Mr. Baum, it was
21 typically with another gentleman that was calling my
22 mother and I for money, for payment, and we would do
23 what we could do.

24 THE COURT: All right. Mr. Baum, your client
25 has in his letter to me and today made certain

1 allegations that raise questions about your relationship
2 with him. Obviously to the extent that it's necessary
3 to respond to those allegations, the attorney/client
4 privilege is waived, and I would ask you, what is your
5 response to these allegations?

6 MR. BAUM: Um, to put the issue in context,
7 your Honor, I guess I'll go back.

8 Mr. Sanborn retained my firm. I'm an employee
9 of United Defense Group. It's not my firm. I'm a
10 salaried employee. But nonetheless I have reviewed the
11 history financially with my business office and then I
12 can talk about my personal contact with Mr. Sanborn and
13 the restitution issue. But Mr. Sanborn retained United
14 Defense Group in March of '08. At that time he knew he
15 was under investigation but he had not been charged.
16 From March of '08 the -- my relationship with the
17 government resulted in a plea agreement being entered
18 into. A guilty plea was entered before your Honor or
19 the magistrate, I don't recall which, and then
20 eventually sentencing.

21 Your Honor inquired about fees. My office
22 records indicate that the agreed fee was \$40,000, and of
23 that Mr. Sanborn or his mother primarily have paid a
24 total of \$22,500. The payments came in mostly in '08,
25 and in '09 a thousand dollars total has been paid

1 towards that fee.

2 That was not my motivation or my thinking at
3 all when the matter of restitution was considered. Mr.
4 Kinsella has a number of exhibits that the government
5 may be offering in this hearing, but they are
6 essentially e-mails going back to March of '09 between
7 myself and Mr. Sanborn, and in one or two instances
8 between myself and Mr. Kinsella, and these e-mails show
9 a long history of my encouraging Mr. Sanborn to come up
10 with restitution because I felt that would be very
11 helpful in the 3553(a) factors concerning his efforts to
12 make restitution.

13 The first that is relevant to restitution in
14 this long chain of e-mails was dated March 19th of '09,
15 at which time I wrote to Mr. Sanborn, "I have already
16 filed a motion to postpone the sentence until June and
17 I'm waiting for the judge's decision which should be
18 okay. I'll let you know. Payment of a substantial
19 amount towards restitution would be very helpful as
20 would paying the balance of attorney's fees. Also,
21 still waiting to get ready for an evaluation."

22 Your Honor may recall in the sentencing
23 memorandum that was filed with the court, there was a
24 psychological evaluation from a Dr. Drogin.

25 In my conversations with Mr. Sanborn from the

1 very beginning I emphasized how important restitution
2 would be. Once I was satisfied that I had done my due
3 diligence in so far as the government having enough
4 evidence to convict him, and once Mr. Sanborn admitted
5 to me that he had committed the acts that were alleged,
6 a plea agreement seemed to be the most appropriate way
7 to resolve the case rather than a trial. And I've been
8 practicing criminal law for over 40 years. I practice
9 mostly in federal court and I'm very much aware of the
10 application of the guidelines and the 3553(a) factors,
11 and I pride myself on being able to test the -- to
12 anticipate what will be important at sentencing and
13 address those issues.

14 So, I was certainly mindful of how restitution
15 could have an impact on the court's attitude towards
16 Mr. Sanborn and his integrity and his acceptance of
17 responsibility and so forth.

18 Starting before these e-mails I had discussed
19 with Mr. Sanborn the strategy, if you will, for
20 sentencing, and that I had to be assured by him that he
21 realized how important restitution was and he would be
22 making those efforts.

23 The string of e-mails that I believe your
24 Honor is reviewing now reflect my regular reminding of
25 Mr. Sanborn of my -- and my encouraging him to address

1 this restitution issue.

2 I was aware that he had a job at Geocomp. A
3 letter from his senior vice president was part of the
4 package that was submitted to your Honor in the
5 sentencing memorandum. And I was aware he was doing
6 well at that job, but the issues of restitution always
7 seemed to be that his family was going to come up with
8 it, his mother was going to come up with it, some of
9 these e-mails refer to a cousin or one of the e-mails
10 refers to a cousin. Mr. Sanborn felt that his cousin
11 was going to come up with 100 to \$150,000 towards
12 restitution.

13 I keep pretty detailed notes of conversations
14 that I have with people, telephone conversations, and
15 I'm reviewing my notes here. I find that in June of '09
16 at Mr. Sanborn's suggestion I spoke to his mother Judy,
17 Judith, about restitution. Mr. Sanborn told me that his
18 mother was willing to help in the payment of
19 restitution.

20 When I spoke with her on June 1st, we spoke
21 about that subject. She told me that the only way that
22 she could raise any kind of money would be selling her
23 house which was the only security she had for her later
24 years and that she was very reluctant to do that. I
25 told Kurt that I had spoken with his mother and that

1 that was her feeling about restitution.

2 It was a constant issue between Mr. Sanborn
3 and me, and it wasn't a bone of contention. It was me
4 trying to counsel him and advise him on ways that he
5 could improve his position before the court for
6 sentencing.

7 Your Honor will recall or the record will
8 reflect there were a number of postponements for
9 sentencing, and there were two main reasons. Mr.
10 Kinsella and I had discussed each time sentencing was
11 coming up that I needed more time and we filed assented
12 to motions to continue sentencing repeatedly, and that
13 was in order to give Mr. Sanborn an opportunity to come
14 up with restitution, and there was also a problem with
15 paying Dr. Drogin who wouldn't go ahead and do the
16 evaluation, which I thought might be helpful, until he
17 got paid.

18 So there were a series of postponements, two,
19 three months at a time for those reasons and those
20 reasons alone. It had nothing to do with my convenience
21 or my schedule, it was strictly to improve Mr. Sanborn's
22 position before the court when it came time for
23 sentencing.

24 Concerning the scenario leading up to the
25 \$20,000 issue, there are e-mails in these exhibits that

1 reflect our encouraging and our guiding Mr. Sanborn on
2 how to get that money to us, including wiring
3 information, and his repeated assurances that it's on
4 its way, it's on its way. What finally happened was a
5 day or two before I left for court, left California to
6 come to Concord, I received the e-mail -- or the fax
7 which is Exhibit 23, and as your Honor can see it says
8 "Enclosed are three checks totaling \$20,000 for Kurt D.
9 Sanborn." It did not indicate that they were for
10 restitution. The balance for fees were about \$20,000.
11 And I, you know, in all candor I don't doubt that they
12 intended that this be for restitution. It was a little
13 ambiguous, but nonetheless the checks came in. The
14 problem was that, and I'm a little uncomfortable saying
15 this, I don't want it to sound critical, but the issue
16 has been raised and I feel that it's important to
17 explain. The history of promises unfulfilled by Mr.
18 Sanborn led me to be somewhat skeptical about this money
19 for a number of reasons. Of the three checks, which I
20 believe are attached as Exhibit 23a, only one was from
21 anyone that I knew, and that was his mother for \$5,000,
22 and she was the one who had been making the attorney's
23 fees payments all along anyway. I don't think Kurt
24 Sanborn ever sent us any money. It always came from his
25 mother, including the initial retainer and payments

1 throughout 2008. In fact, in July there was a payment
2 of \$10,000, a check from Judith Sanborn, which bounced,
3 and then was replaced by another check.

4 So when I got these -- this fax, I didn't know
5 who these other people were or what had been represented
6 to them as to why they were sending us money. I was a
7 little skeptical frankly because Mr. Sanborn has, in my
8 opinion, a tendency to exaggerate or perhaps his
9 credibility is -- I was just skeptical. I didn't know
10 what had been represented as to why this money was being
11 sent to us from Linda Coburn --

12 (Evacuation drill in Mr. Baum's building.)

13 THE COURT: We will just take a short break.
14 Please stay available. These usually take about ten
15 minutes and we will -- is this our building? Oh, this
16 is his building. We will take a break until you come
17 back, sir.

18 MR. SANBORN: Thank you, your Honor.

19 THE COURT: All right, so we will -- call me
20 when he's back.

21 (Recess taken.)

22 THE COURT: All right, Attorney Baum, why
23 don't you finish what you were saying.

24 MR. BAUM: Thank you, your Honor. I was
25 explaining my thinking so far as why I failed to inform

1 the court about these three checks, and a lot of it had
2 to do with the history of Mr. Sanborn and his somewhat
3 manipulative attitude towards things, including the fact
4 of trying to get his -- I'm sorry?

5 THE COURT: To summarize here, I understand
6 you're telling me that you had a long history with Mr.
7 Sanborn in which you had not gotten your bill fully
8 paid, that Mr. Sanborn's mother at one point bounced a
9 check to you, and you had had many conversations with
10 Mr. Sanborn about the importance of trying to provide
11 restitution, and him having made statements to you
12 suggesting that some restitution payments would be
13 forthcoming but nothing materialized, you received these
14 checks very close to the time of the scheduled
15 sentencing, only one of them was from a person that was
16 known to you, you didn't know anything about the other
17 two, you weren't sure that the checks would clear, and
18 you therefore didn't think it would be a good idea to
19 talk about them at the sentencing.

20 Is that a fair summary of what it is you're
21 telling me?

22 MR. BAUM: That's an excellent summary, your
23 Honor. My concern was had I represented to the court
24 that we now had \$20,000 towards restitution. Had the
25 court inquired as to the source of the restitution, I

1 would have had no answers. Furthermore, at the time
2 that we appeared before your Honor for sentencing I
3 didn't know whether those checks would clear, and I
4 felt, as I explained to Mr. Sanborn in Exhibit 21, the
5 e-mail that I sent him after I became aware that he and
6 his family were dissatisfied with my not having brought
7 up the restitution, especially when your Honor had
8 inquired about restitution and that commented how that
9 can sometimes help, my explanation was that I chose not
10 to mention it because I thought that it might be
11 counterproductive.

12 THE COURT: Did you have any -- excuse me,
13 prior to the time of the sentencing, did you have any
14 conversations with either Mr. Sanborn or his mother
15 about these checks?

16 MR. BAUM: Yes. In the hallway outside court
17 shortly before the sentencing hearing I contacted my
18 office and I learned that the checks had been received
19 by my office the previous day --

20 THE COURT: Stop, stop, stop. I'm confused
21 now. Are you telling me that the first you learned of
22 these checks having been received by your office was
23 when you were here in New Hampshire immediately before
24 the sentencing?

25 MR. BAUM: Yes, your Honor. The fax that I

1 received a couple of days earlier have photocopies of
2 the checks, which is one of the exhibits before your
3 Honor, but they had not reached my office by the time I
4 left for Concord the day before sentencing.

5 THE COURT: Oh, okay.

6 MR. BAUM: The fax with the photocopy had
7 reached us, but the checks themselves had not. I called
8 my office early that morning of sentencing and I found
9 out that the checks had arrived in the mail late the day
10 before, but they hadn't been processed. So that was
11 further concern that I had in making a representation to
12 your Honor that we actually had restitution, I couldn't
13 make that representation in good faith.

14 THE COURT: Between the time that you received
15 the fax and the day of sentencing, did you have any
16 conversations with either the defendant or his mother
17 about these checks?

18 MR. BAUM: No, sir.

19 THE COURT: And then on the day of sentencing
20 after you called your office and learned that the checks
21 had been received, did you have any conversations with
22 the defendant or his mother between the time you learned
23 that the checks had been received by your office and the
24 time of the sentencing hearing?

25 MR. BAUM: Yes, your Honor, we were all out in

1 the hallway, Mr. Sanborn, his mother and several
2 relatives. I'm not sure that the relatives overheard
3 the conversation, but I explained that I confirmed that
4 the office had received the checks but that they hadn't
5 cleared and I thought it was a bad idea to make a
6 representation to the court that we had this money for
7 restitution. At that time I did talk to the mother
8 privately about her continuing obligation and promise to
9 pay the fees, and she agreed to apply the \$20,000
10 towards the balance of fees. I'm telling you, your
11 Honor --

12 THE COURT: Let me in understand the --

13 MR. BAUM: -- in all candor --

14 THE COURT: Let me understand the relationship
15 between those two conversations. You're describing a
16 conversation in which Mr. Sanborn was a participant in
17 which you explained to Mr. Sanborn and his mother that
18 it would be inadvisable to raise the \$20,000 with the
19 court, and then you were describing another conversation
20 with the mother that what you say was private in which
21 you reminded her of Mr. Sanborn's continuing debt to the
22 firm.

23 Tell me about the temporal relationship
24 between these two conversations. When did they occur in
25 relation to each other?

1 MR. BAUM: Oh, just all within the same couple
2 of minutes before we came into the courtroom.

3 THE COURT: Did you pull the mother away or
4 did you ask Mr. Sanborn to leave? How did it happen
5 that you spoke to her privately about the fee?

6 MR. BAUM: When I say I spoke to her
7 privately, I didn't mean to imply that I made any effort
8 to prevent Mr. Sanborn from listening to what was
9 discussed. I was just addressing my comments to Mrs.
10 Sanborn, and I think that Mr. Sanborn was there at the
11 time, and then she handwrote in front of everybody this
12 authorization to apply this \$20,000, if it cleared,
13 towards fees.

14 THE COURT: Did you suggest to her that the
15 money should be applied to the fee?

16 MR. BAUM: Yeah. Yes.

17 THE COURT: Okay.

18 MR. BAUM: The only other thing I have to
19 comment on, your Honor, is the matter of three jobs that
20 Mr. Sanborn represented in his motion. I never heard
21 anything about him working weekends or extra jobs or
22 money being accumulated. All of the representations he
23 made to me about restitution had to do with members of
24 his family coming up with the money. Never said
25 anything about any other jobs. I clearly, had I known

1 about that, would have informed the court. If you
2 recall my sentencing memorandum, I tried to present all
3 of the mitigating factors, and that certainly would have
4 been something that I would have brought to the court's
5 attention. The first I heard of any jobs other than the
6 one, the Geocomp, was when I saw the motion for
7 reconsideration that Mr. Sanborn's mother brought.

8 THE COURT: Is it your position that the
9 advice you gave Mr. Sanborn and his mother concerning
10 the issue of whether to mention the money at sentencing
11 was independent advice that was unrelated to the later
12 communication you had with Mr. Sanborn's mother about
13 applying that balance to the outstanding fee balance
14 with the firm?

15 MR. BAUM: That is my testimony, your Honor.
16 Absolutely unequivocally my principal concern was not
17 getting the firm paid. My concern was making the best
18 presentation to the court concerning Mr. Sanborn and the
19 sentencing factors.

20 THE COURT: All right. Now, if you had known
21 that the \$5,000 was earned by Mr. Sanborn through
22 working additional jobs for the purpose of generating
23 monies to apply to restitution, would that have affected
24 your thinking about whether that was something that
25 should be mentioned to the court, assuming that you

1 could independently verify it?

2 MR. BAUM: Probably, your Honor, I probably
3 would have postured it to the court in a way that would
4 be candid with the court that although the money was in
5 check from Mrs. Sanborn, if I were satisfied that that
6 \$5,000 was money that Mr. Sanborn had earned and had in
7 fact given it to his mother for her to send me for
8 restitution, then that would have been legitimate. That
9 would have been a legitimate mitigating circumstance
10 which I would have asked the court to consider.

11 THE COURT: Even though it was small in
12 relation to the total restitution obligation and
13 arguably is viewed in a different light if it can be
14 demonstrated that in fact the person took on extra work
15 assignments and devoted income generated from that to
16 restitution. In terms of what it says about somebody's
17 acceptance of responsibility, efforts to make amends for
18 his crime and to say what it says about somebody's
19 potential for rehabilitation, it seems arguably that
20 that kind of action needs to be viewed differently from
21 simply someone who is able to prevail upon friends with
22 means to pay off his restitution obligation in advance.
23 In terms of what it says to a judge, it seems to me
24 those two are very different kinds of things. Do you
25 agree with that or not?

1 MR. BAUM: I agree with that wholeheartedly,
2 your Honor. There have been many cases where I have
3 presented evidence to a court where there has been
4 substantial restitution and my client has had meager
5 earnings but has made some effort just along the lines
6 of not the dollar amount but the sincerity of the
7 acceptance of responsibility. So I most definitely
8 would have brought that to the court's attention and the
9 dollar amount would not have prevented me from doing
10 that.

11 THE COURT: And did anyone tell you at any
12 point prior to the sentencing that the \$5,000 that came
13 from the defendant's mother was in fact money that the
14 defendant had himself earned by working additional jobs?

15 MR. BAUM: No, your Honor, that was never
16 mentioned at all.

17 THE COURT: The first you heard of that was
18 after the sentencing?

19 MR. BAUM: When I read it in the motion, yes.

20 THE COURT: Okay. And I take it you've had
21 the money removed from the trust account and applied to
22 the outstanding fee balance owed to the firm?

23 MR. BAUM: Oh no, not at all, your Honor.
24 Once I was aware of this controversy, I instructed my
25 office not to touch the money and it's still in the

1 trust account, and we will defer to the court if the
2 court --

3 THE COURT: Do you have a --

4 MR. BAUM: -- makes some ruling.

5 THE COURT: Do you have a fee agreement with
6 the defendant in this case? Is there a written fee
7 agreement?

8 MR. BAUM: Yes, your Honor.

9 THE COURT: And who is obligated under the fee
10 agreement. Is it the defendant or is it the defendant's
11 mother or who's obligated under it?

12 MR. BAUM: If I may review the retainer
13 agreement, your Honor. It was signed by Kurt Sanborn,
14 although all of the commitments and payments were made
15 by his mother. On June 1st of 2008 Kurt Sanborn signed
16 the retainer agreement.

17 THE COURT: All right. Did you, when you
18 suggested to the defendant's mother that they apply this
19 money to the outstanding balance of the firm, did you
20 inform her as to what consequences would follow, if any,
21 if she didn't do that?

22 MR. BAUM: No, your Honor.

23 THE COURT: Specifically did you tell her I'm
24 not going into court today and I won't represent your
25 son on this matter unless it's paid or something like

1 that?

2 MR. BAUM: Oh heavens, no. Absolutely not.
3 Neither in words nor in inference.

4 THE COURT: All right. Is there anything else
5 you wanted to tell me?

6 MR. BAUM: I always had a very -- no, your
7 Honor.

8 THE COURT: Okay. Is there anything else you
9 wanted to tell me about -- anything about this matter
10 that you feel I need to know?

11 MR. BAUM: I can see how Mrs. Sanborn might
12 have felt -- might have felt pressured. She's a very
13 good woman and she's tried to keep her son's commitment
14 to my firm and help him by making payments when she
15 could, and I apologize if I caused her any more stress
16 than this whole experience has caused her. I have much
17 greater compassion for her than I do for her son who I
18 think has been very manipulative to his family and has
19 contributed or exacerbated their whole experience.

20 THE COURT: All right. Mr. Kinsella, what if
21 anything did you want to say in addition to what's
22 already been said?

23 MR. KINSELLA: I think that, and I don't know
24 if it makes a difference to you, but I think I should
25 point it out that you have been discussing with Mr.

1 Sanborn --

2 MR. BAUM: Your Honor, I'm sorry, I can't hear
3 Mr. Kinsella.

4 MR. KINSELLA: I'm sorry.

5 THE COURT: Can you hear him now?

6 MR. KINSELLA: Is that better?

7 MR. BAUM: Yes, thank you, your Honor. Yes, I
8 can hear you now.

9 MR. KINSELLA: You've had some discussion with
10 Mr. Sanborn and Mr. Baum relating to the \$5,000 that
11 came from the defendant's mother that we've been talking
12 about was earmarked by the defendant allegedly for
13 restitution. However, in his motion to reconsider, the
14 defendant's mother, in the motion that she signed for
15 the defendant states, "the defendant had worked in some
16 cases up to three jobs to be able to accumulate \$20,000
17 in restitution payments". So there's sort of a
18 disconnect between what was represented to the court in
19 the beginning, what's now being talked about in the
20 court based upon what has been represented to the court
21 today. I think that Mr. Baum had just mentioned that he
22 was unaware of the \$5,000 that the mother had
23 contributed, that that would be for restitution, and he
24 wasn't aware of that fact until he reviewed the motion,
25 but the motion says it was \$20,000 that was earned

1 through these jobs.

2 THE COURT: All right, Mr. Kinsella, will you
3 remind me, what was the amount of restitution that was
4 owed here in total?

5 MR. KINSELLA: Slightly more than \$290,000.

6 THE COURT: Okay. Mr. Sanborn, did you want
7 to say anything else in response to what you just heard?

8 MR. SANBORN: If I may, your Honor.

9 THE COURT: Yes.

10 MR. SANBORN: In Mr. Baum's testimony he
11 states that he was unaware that these funds would
12 specifically be designated for restitution. But if you
13 look at the e-mail of November 10 that was sent by his
14 accounting people, it specifically states that the
15 account is to be made out to the trust account, whereas
16 the payments that had been made to his office --

17 THE COURT: Which exhibit number are we
18 talking about?

19 MR. SANBORN: It should be Exhibit 16, your
20 Honor. Under account number it says you make it out to
21 the trust account, whereas any previous payment made has
22 always been made out directly to his firm. And if you
23 reference the checks that were sent, you will see that
24 they're made out to the Defense Group Trust Account.

25 I'll also make it absolutely 100 percent clear

1 that there was very little communication between Mr.
2 Baum and myself except that it was constantly a request
3 not necessarily from Mr. Baum, but from another person
4 in his office for payment.

5 We also had to pay \$5,000 which, as you can
6 see, we're not financially wealthy people, so \$5,000 is
7 a lot of money, and we had to pay for the Dr. Drogin
8 report before that would proceed. So that was money
9 also that was earned.

10 I also want to point out that based upon what
11 I've heard today from Mr. Baum it makes it very clear to
12 me that I don't know how he could ever properly defend
13 me based upon what he's saying.

14 I would also like, your Honor, Mr. Baum has
15 brought my mother into this and made it clear that a big
16 part of the conversations that he's had and conducted
17 over the last year had been with her. She's here today
18 and I would respectfully ask the court to allow her to
19 talk and tell you, because there's a lot of pieces I
20 wasn't associated with --

21 THE COURT: I'm happy to hear what she has to
22 say, but to be clear, Mr. Baum didn't bring your mother
23 into this, you brought your mother into it by involving
24 her in this effort to -- I mean, you're an adult.
25 You're not a child. If you wanted to retain counsel and

1 pay counsel and interact with counsel, you are free to
2 do that. You've chosen apparently to involve your
3 mother. You also chose to write me a letter that
4 inevitably would implicate and involve your mother in
5 this matter. So it's you who did it, not anyone else.
6 But I'm happy to hear, if your mother wants to say
7 something, I'm happy to hear what she wants to say.

8 MR. SANBORN: I agree, sir, and I've taken
9 full responsibility for it. The only reason she is
10 involved is, as you can tell, I have not been
11 financially very good with money. So the monies that
12 were paid to Mr. Baum's firm and the monies that I said
13 were all earned from me, I gave her money to pay my
14 bills because I'm not very good at it, sir, I'm just not
15 good at it.

16 THE COURT: If you want her to say something,
17 I'm happy to hear what she has to say. I haven't taken
18 any sworn testimony here. I'm not doing this with
19 prejudice to the defendant's right to pursue relief
20 under Section 2255 which would need to be through an
21 appropriate motion, I'm pursuing this matter because
22 when I get a letter from a defendant that makes
23 allegations about his attorney that call into question
24 whether his attorney is behaving in accordance with the
25 requirements that we impose upon attorneys who appear in

1 front of us, I feel duty bound to make some inquiry to
2 determine whether there's a basis to refer the attorney
3 for some kind of review either by this court or by the
4 bars of which he's a member, and that's the purpose for
5 which I'm conducting this inquiry now, and I'm doing it
6 in an informal way in an attempt to see whether there's
7 a need to do something more formal. But, so I'm not
8 going to ask that your mother be sworn, but if she wants
9 to say something, I'll be happy to hear what she wants
10 to say.

11 MR. SANBORN: I would welcome that. Thank
12 you, your Honor. One other just quick thing before she
13 comes up.

14 THE COURT: Yup.

15 MR. SANBORN: When we were in that hallway
16 prior to sentencing, obviously a very difficult time, it
17 was made clear to us that the money, and we did confirm
18 the next morning on the 20 because we couldn't do it by
19 the time we left court, that that money had cleared and
20 was in their account, there's no question about that,
21 the issue that we have very simply in that motion and
22 maybe we didn't articulate it because we're not
23 attorneys was just this. Knowing what you were saying
24 in court that day, your Honor, that it was so important
25 to have earned money, I did, but Mr. Baum elected not

1 even to discuss it, to even bring it up in any way, but
2 yet one minute before we walked into this courtroom he
3 pulled my mother aside and had her, if he didn't think
4 this was restitution money, why did he have her
5 handwrite a letter that stated he could take the money
6 out of the trust and put it into the operational
7 account. And our concern is just why didn't he put the
8 best foot forward, and based upon his testimony today,
9 it's apparent to me that he just didn't have that
10 intention.

11 THE COURT: All right, I'll hear whatever --
12 ma'am, if you want to say something, come on up here so
13 you can speak into a microphone. And you can, if you're
14 comfortable standing there at the lectern, you can do
15 that.

16 MRS. SANBORN: Your Honor, I'm not comfortable
17 here at all. I think I've only spoken with Mr. Baum
18 twice other than out here in the hall. That day we were
19 all distressed, I admit. We were listening to him tell
20 the proceeding. The very last thing he said was about
21 not presenting you with money because it would be an
22 embarrassment. As soon as the people started coming out
23 of the door prior to our case, he went to his briefcase,
24 took out a pad like this and asked me to authorize them
25 to take that \$20,000 out. Now, I have never received a

1 statement from them, a financial statement at all,
2 never, and I did check and -- but I have had many
3 harassing phone calls from David Rosen in his office
4 asking me for money, and I finally told him that any
5 more money, we had no more money, it would have to be
6 earned first and then given to him, and his statement to
7 me was sell your house, just outright like that. So I
8 feel that I'm just as -- that I was right in sending
9 money. Any money I had sent is because he has earned
10 it. He gives it to me. Any money that people have
11 given us for this restitution --

12 THE COURT: Well, let me try to be sure I
13 understand this. There are three checks here.

14 MRS. SANBORN: Yes.

15 THE COURT: One is for \$5,000 made out --
16 drawn on your account.

17 MRS. SANBORN: That's right.

18 THE COURT: And the other two are drawn on
19 other accounts.

20 MRS. SANBORN: That's right. That was money
21 that was given to me which he has already started paying
22 back to these people for this.

23 THE COURT: All right, so he hadn't worked any
24 jobs to earn the --

25 MRS. SANBORN: Oh, he did. There was other

1 money. But don't forget, we had to give it to Dr.

2 Drogin.

3 THE COURT: Can I just finish, ma'am.

4 MRS. SANBORN: Go ahead.

5 THE COURT: The \$5,000 check on the Coburns,

6 he didn't do any work for that money, that was a

7 contribution from a friend.

8 MRS. SANBORN: No, no, it's a loan.

9 THE COURT: Okay. And the same from Dr.

10 Tripathi, that's just a loan that he made, not something

11 that your son worked for.

12 MRS. SANBORN: Well, he is working for it.

13 THE COURT: I understand that, but I --

14 MRS. SANBORN: That's right. Not extra jobs,

15 yes, you're right.

16 THE COURT: I just need to have my questions

17 answered.

18 MRS. SANBORN: Yes.

19 THE COURT: Do you have any personal knowledge

20 as to whether the \$5,000 that was drawn on your account,

21 whether that was money that was in fact earnings that

22 your son acquired and was paid to you rather than him by

23 working for his brother?

24 MRS. SANBORN: My other son --

25 THE COURT: And just be sure, it's important

1 to be truthful with me.

2 MRS. SANBORN: Yes. He had given me some
3 money but that 5,000 is money Kurt gave to me in bits
4 and pieces because that's the only way he can do it. He
5 can't take a legitimate, a weekly part-time job in
6 excess, he travels too much. So that was his money.

7 THE COURT: Let me be clear. You're telling
8 me that the \$5,000 that is the amount of this check that
9 you wrote to the Defense Group trust account, is money
10 that your son, the defendant, gave to you, not your --
11 not the defendant's brother, but the defendant gave it
12 to you?

13 MRS. SANBORN: Yeah, but some of that, one son
14 gave it to the other and he just gave it to me because
15 I'm the keeper of it.

16 THE COURT: Just so we have no
17 misunderstanding. You're telling me the defendant, Kurt
18 Sanborn, gave you this money, not his brother?

19 MRS. SANBORN: Right.

20 THE COURT: Okay. And what you're saying is
21 your understanding is, that some of that money Kurt
22 Sanborn got from his brother in exchange for doing work
23 for his brother.

24 MRS. SANBORN: Right.

25 THE COURT: Okay. And are you telling me also

1 that that \$5,000 was money that Kurt Sanborn had
2 acquired and given to you for the purpose of using it
3 for restitution?

4 MRS. SANBORN: Ah-hum, ah-hum.

5 THE COURT: You're nodding your head yes.

6 MRS. SANBORN: Yes.

7 THE COURT: Is there anything else you want me
8 to know?

9 MRS. SANBORN: If I could think about it, but.

10 MR. KINSELLA: Judge, may I ask a question?

11 THE COURT: Yes.

12 MR. KINSELLA: The two additional checks, one
13 from a doctor for I believe 5,000 or 10,000.

14 MRS. SANBORN: 10,000.

15 MR. KINSELLA: And another from the Coburns --

16 MRS. SANBORN: Another five.

17 MR. KINSELLA: Did you participate in
18 conversations with them through which they agreed to
19 give money to the defendant?

20 MRS. SANBORN: Yes, they know what it was for.

21 MR. KINSELLA: Did they know it was for -- did
22 they think it was for restitution?

23 MRS. SANBORN: Oh yes.

24 MR. KINSELLA: Or to pay a legal fee?

25 MRS. SANBORN: No. It was for restitution.

1 That's why they both said for the trust account, because
2 it wasn't to pay the legal fees.

3 THE COURT: Okay. Well, thank you, ma'am.
4 You're all set? All right.

5 As I said, I'm not going to treat this as a
6 2255 motion. I think the defendant should be free to
7 decide for himself whether he has any Section 2255 claim
8 here or not, but his letter was something I simply
9 couldn't overlook.

10 I have not taken sworn testimony here today.
11 I've asked each party to give me their information
12 concerning it.

13 A couple of things. I don't know if it will
14 be any consolation to you, Mr. Sanborn, but I can't say
15 that the restitution payments that you were proposing to
16 make here would have affected my sentencing judgment in
17 any way. I really believe that that is quite unlikely
18 that it would have affected my judgment in any way. I
19 feel very strongly that the \$15,000 that you were able
20 to get friends to pay really would not have affected my
21 judgment in any way.

22 It might have been, if in fact you could have
23 demonstrated that you in fact had worked on these other
24 jobs, affidavits from people who you had done the jobs
25 for, something from your mother saying you had

1 accumulated this restitution account and had that all
2 lined up in advance of sentencing, that would have been
3 a mitigating factor in my mind because I can't make you
4 work to pay restitution. I can only require you to try
5 to get a job and to pay a small percentage of your money
6 towards restitution. And so although \$5,000 is very
7 small, it could have potentially been another mitigating
8 factor to add to the mix in terms of sentencing. But
9 even so, I doubt frankly that it would have affected my
10 sentencing judgment in any way. And if it did affect my
11 sentencing judgment, it would only have been a very
12 minor affect because I had to consider many other
13 factors in sentencing you.

14 In terms of what happened here, my principal
15 concern is whether I need to take any action against
16 Attorney Baum. And I'm not prepared, based on what I've
17 heard today, to conclude that a referral to a
18 professional conduct committee is warranted. If you
19 have a different view of it, Mr. Kinsella, I'd be
20 interested in hearing your assessment of the matter.

21 MR. KINSELLA: I do not, judge.

22 THE COURT: All right, Mr. Sanborn, you're
23 free to make any complaints that you wish to make. I
24 would suggest this, however, though. Having heard the
25 story, Attorney Baum, I am concerned about the --

1 whether Judith Sanborn in fact even has the authority to
2 assign checks written by others for a different purpose
3 to be applied to your outstanding fee. Those
4 individuals have no, as far as I can see, have no legal
5 obligation to the defendant or to your firm, and if they
6 wrote checks that were intended for restitution, I don't
7 believe that it's clear to me on this record that Mrs.
8 Sanborn has any power to assign them to your firm for
9 purposes of payment of your fee. Now that you've heard
10 her testimony on that point or her explanation, unsworn
11 statement, if it's true, do you see the problem? You
12 have a third party writing checks that they want to be
13 applied to restitution, that it's not clear to me they
14 were given to Mrs. Sanborn, if what she's says is
15 correct, solely for the purposes of allowing
16 restitution, not to pay legal fees. And you'd have to
17 get permission from those individuals, it would seem to
18 me, unless they had given actual or apparent authority
19 to Mrs. Sanborn to assign the proceeds to your firm. So
20 I'm not requiring -- I don't believe I have jurisdiction
21 over the matter and can't require you to do anything,
22 but it seems to me at the very least the two checks that
23 were written by third parties, it's not clear to me at
24 all that your firm has any legitimate claim to that
25 money and you ought to give serious thought to refunding

1 that money to the individuals who produced the checks.

2 Do you have a different assessment of the
3 matter?

4 MR. BAUM: No, not at all, your Honor. In
5 fact, as soon as Mrs. Sanborn revoked the authorization,
6 I instructed, I e-mailed Mr. Sanborn and I said please
7 have each of these parties let me know or request a
8 refund, and I will send them their 5,000 and 10,000
9 respectively, and I haven't received anything, but we
10 have no intention of transferring that money into our
11 general account, and when I am requested or instructed
12 to refund that 20,000, that's exactly what we're going
13 to do.

14 THE COURT: Okay. And I think that may well
15 apply to the \$5,000 that Mrs. Sanborn wrote to you.
16 It's a little less clear to me about how that money
17 should be dealt with since both Mrs. Sanborn and Mr.
18 Sanborn say that's his money that he earned, but
19 nevertheless, even if a client gives money to an
20 attorney to be used for one purpose, I think an attorney
21 has to be very careful and there are circumstances under
22 which the attorney can disregard those instructions and
23 instead apply to an outstanding fee balance presents a
24 complicated set of questions that you might be better
25 off simply avoiding by refunding that money to her.

1 I don't for a minute dispute your right to be
2 paid for your services. Mr. Sanborn entered into a fee
3 agreement with your firm. You're entitled to be paid.
4 And it is not in any way troubling to me that your firm
5 would demand payment and take whatever actions are
6 necessary to insure that the firm is paid consistent
7 with your ethical obligations to Mr. Sanborn. And so
8 I'm not in any way suggesting that you shouldn't be
9 paid. I'm simply suggesting that under the
10 circumstances under which this money found its way into
11 your trust account, and again, I'm not ordering you to
12 do this, I'm simply suggesting that this may be the more
13 prudent thing to do. The more prudent thing to do may
14 be simply refund the entire balance while still
15 maintaining a demand that you wish to make against Mr.
16 Sanborn for any outstanding unpaid attorney's fees.

17 MR. BAUM: I agree, your Honor, and we have
18 every intention, we will do that. I would prefer
19 refunding the two checks from the other parties to them
20 directly. So if Mr. Sanborn or his mother will provide
21 me with some indication that that's consistent with what
22 they want, then that's what we'll do, and we will send
23 the 5,000 back to Mrs. Sanborn.

24 THE COURT: That, I think that would be the
25 easiest thing to do. Mr. Sanborn, you're not asking me

1 for any particular relief at this point with respect to
2 your case or your sentence, but with respect to the
3 money, does that seem to you to be an appropriate thing
4 to do here, to simply obtain the necessary
5 authorizations from the individuals who wrote the
6 checks, allowing those monies to be refunded to those
7 individuals, and having the firm refund the \$5,000 to
8 your mother?

9 MR. SANBORN: That's absolutely fine, your
10 Honor, I just -- the money was supposed to be to help
11 start paying down what I owe, and I think that -- we
12 can't rewrite history and I still am just totally
13 confused of why a defense attorney wouldn't try to
14 portray this in the best light, and that day he allowed
15 you to continually discuss how I made no efforts when he
16 knew two minutes earlier in that hallway he had assigned
17 papers to divert money from restitution payments to his
18 personal account, and I'm just -- this whole motion
19 isn't about resentencing or any of that. It's about we
20 can't rewrite what happened that day.

21 THE COURT: Let me say a couple things.
22 First, I think we've agreed on the appropriate method to
23 get the money out of the trust account and back to the
24 individuals involved.

25 You say you can't rewrite history and that you

1 say your purpose was to get restitution to the victim.
2 If that is so, there is absolutely nothing prohibiting
3 you from simply getting appropriate checks cut to the
4 probation office for the purpose of paying this money
5 directly to the victims for restitution. So, if you're
6 really -- if that's what your real concern is, not
7 simply trying to get a reduction in your sentence but
8 trying to get restitution and those people are willing
9 to stand by and produce that money for restitution in
10 exchange for your agreement to try to repay them at a
11 later date, then I strongly encourage you to do that.
12 It won't affect your sentence one way or another whether
13 you do it or don't do it, but if that's what you're
14 intending to do, it won't make the victim whole, but
15 something approaching 7, 8 percent of the total
16 restitution balance certainly wouldn't hurt if you
17 really do want to make amends and compensate the victim
18 for the -- in part.

19 So, if you're willing to do that, I would
20 encourage you to do it. I'm not requiring you to do it.
21 I'm telling you that it won't affect your sentence in
22 any way. But if that's what you really want to do, you
23 can see that that happens.

24 With respect to whether you're trying to
25 understand your lawyer's position, and I'm not

1 interested in defending your lawyer, I simply will tell
2 you that he is right about this. If he had walked in
3 and said, judge, I've got a check for 20 grand here, 15
4 of which had been -- or from his perspective of what he
5 says is true, he didn't know this was -- any of it was
6 because of jobs you worked, simply we got the mother and
7 some friends that are willing to advance the defendant
8 some money to pay the restitution and we're agreed to
9 offer it now, I would have said, great, thank you, I
10 appreciate that, but it would not have affected my
11 sentencing judgment in any way, and I think he was
12 essentially correct about that assessment.

13 Certainly to the extent someone can make
14 restitution to a victim and the victim stands up in
15 court and says, judge, restitution has been made to me,
16 I am grateful, I am satisfied, I believe this defendant
17 has shown true remorse and has tried to make amends, if
18 a victim says that to me at a sentencing hearing, that
19 can affect my sentencing judgment.

20 If a defendant undertakes efforts to earn
21 money himself that he otherwise, I couldn't otherwise
22 compel him to earn and devotes that to restitution in
23 advance of sentencing, that could have an affect,
24 although given the amounts here, at most would have had
25 a modest affect in your sentence. But simply coming

1 into court and saying I've got wealthy friends who can
2 pay that debt off, judge, let me go, that isn't
3 happening with me. It doesn't cut it, it never has, it
4 never will. And given the crime that you committed, you
5 would have been going to prison anyway. So I don't want
6 to give you any false allusions about that.

7 So your lawyer, if under the circumstances, if
8 they are as he described them, that I get these checks,
9 little explanation, I don't hear that they're even
10 deposited until the day of the sentencing hearing, it's
11 only \$20,000, I don't know anything about the defendant
12 having worked multiple jobs to try to get the proceeds,
13 his judgment about that is an entirely appropriate
14 judgment for a lawyer to make because in fact that
15 information would not have benefitted you, I'm confident
16 in saying that.

17 Now, if there -- there were certain risks
18 associated with it. If, for example, I've got the
19 restitution but it's not -- he makes a statement like
20 that and it turns out the checks bounce, now you say he
21 knew they were deposited or they had been deposited as
22 of that day, he didn't tell me he knew they had been
23 deposited, he suggested he had some concern about
24 whether they would in fact clear. Ordinarily when
25 people make a restitution payment in advance of

1 sentencing, they make it. They give it to the probation
2 office in advance of sentencing. This was done at such
3 a late date that it would have been impossible,
4 virtually impossible to do that.

5 So, you may, and you are free, I'm not in any
6 way suggesting that you should or should not, you are
7 free if you believe that your lawyer had not acted
8 consistent with his professional responsibilities to
9 pursue the matter with an appropriate professional
10 conduct committee. You are free if you believe that you
11 have received ineffective assistance of counsel to raise
12 that issue in an appropriate motion in an appropriate
13 time. The motion is called a Section 2255 motion. The
14 court has forms that deal with it. Ordinarily you have
15 to bring that claim within one year of the judgment in
16 the case or it is barred. If you bring such a claim, I
17 will consider it, but I'm not giving you any false hope
18 about any such claim really being meritorious, but
19 you're free to do it. So I'm not compromising you from
20 doing anything. I just was unwilling to let this matter
21 go without further investigation having received your
22 letter. Having received your letter and heard each
23 parties' view of it, it's not my view that I am duty
24 bound to refer this matter. What I have heard here does
25 not suggest to me that Attorney Baum breached his

1 professional conduct obligations, and instead this
2 appears to be a matter that was in the nature of a
3 misunderstanding. I'm not here to praise Attorney Baum
4 about this, that's not my job, nor is it to criticize
5 him. My job is to figure out did he violate his
6 professional conduct obligations in such a way that
7 would require me to refer it to a professional conduct
8 organization, and while I'm not pleased with all of his
9 actions, I don't feel that he has engaged in conduct
10 that violates his professional conduct obligation, so
11 I'm not prepared to make a referral at this time. Yes?

12 MR. SANBORN: Your Honor, I guess, you know,
13 this whole thing has been drawn out for me and my family
14 and what we really wanted to show more than anything was
15 intent. That I had good intentions. I continue to have
16 good intentions. And I hear it all the time from
17 attorneys. My question is, where was his intent and,
18 you know --

19 THE COURT: Well, I think he had multiple
20 intents. His intent was to try to represent you and get
21 the lowest possible sentence for you by urging you
22 repeatedly to come up with restitution money.

23 MR. SANBORN: And I tried.

24 THE COURT: You delayed until the very last
25 minute providing any and then you provided a very small

1 percentage of the total result. He made a judgment that
2 wouldn't be in your interest to raise that matter with
3 the court based on what he says he knew at the time.
4 That seems to me to be an entirely appropriate judgment.
5 He also knew that he had an outstanding fee obligation,
6 and he saw this money as available to satisfy his fee.
7 I would not have pursued the matter in the same way that
8 he did. He, having heard the circumstances,
9 understanding the details of it now is prepared to
10 refund the money, and I'm not prepared to say that that
11 -- that his actions violate his obligations under the
12 professional conduct code, and beyond that I'm not
13 saying you should be happy or satisfied with what he did
14 in this case, I'm simply saying I'm not satisfied that I
15 have a duty to refer this for further investigation by a
16 professional conduct committee. I would not have
17 pursued the matter in the same way that he pursued it.
18 I would have, based on what he says he knew, I would
19 have most likely made the judgment not to mention it at
20 the sentencing hearing. If I could have gotten the
21 money in advance, far enough in advance and I was
22 satisfied that it was legitimate, from a legitimate
23 source of funds that could be applied to restitution, I
24 would direct that the restitution be paid in advance to
25 the probation office, well in advance, but he didn't get

1 it until the very end.

2 What I would not have done is I would not have
3 spoken to your mother and asked the mother to assign
4 that to the outstanding fee balance. I simply would
5 have left the money in the account until after the
6 sentencing hearing and then explored the matter further
7 with your mother and you, making clear that we're
8 prepared to refund the money to you but not prepared to
9 abandon our demand that you pay our fee because you owe
10 him just like you owe anybody else that does things for
11 you. You have a contractual obligation to pay him.
12 He's entitled to seek payment from you. But under these
13 circumstances, I would not have asked the mother to
14 assign the money to the payment of the outstanding fee
15 balance. I would have instead, especially because if
16 two of the three checks come from third party sources
17 and the third comes from your mother who is not
18 contractually obligated to pay your fee, you are, I
19 would have refunded the money and continued to make
20 demand that you make payment. His decision to do
21 otherwise, under these circumstances it is not clear to
22 me that it is a professional conduct violation and Mr.
23 Kinsella is not arguing that it is, so I'm not prepared
24 to make a referral. That's all I can say about that.

25 MR. SANBORN: Thank you for the time. I

1 appreciate it.

2 THE COURT: All right, is there anything else
3 we need to cover today?

4 MR. KINSELLA: No, thank you.

5 THE COURT: All right, thank you.

6 MR. BAUM: Your Honor?

7 THE COURT: Yes?

8 MR. BAUM: Your Honor, I would like the
9 exhibits, I mean they're not my exhibits, but could they
10 be made part of the record?

11 THE COURT: Yes, the exhibits will be made
12 part of the record.

13 MR. BAUM: Thank you, your Honor.

14 THE COURT: Is there anything else?

15 MR. BAUM: No, your Honor.

16 THE COURT: All right, thank you.

17 (Adjourned at 2:35 p.m.)

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C E R T I F I C A T E

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I, Sandra L. Bailey, do hereby certify that

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the foregoing transcript is a true and accurate

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transcription of the within proceedings, to the best of

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my knowledge, skill, ability and belief.

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Submitted: 6/17/10

/s/ Sandra L. Bailey

SANDRA L. BAILEY, LCR, CM, CRR

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